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ARTICLES

PROTESTANT JURISPRUDENCE AND MODERN DOCTRINAL SCHOLARSHIP

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ANGLO-AMERICAN jurisprudence has concentrated a good deal of attention upon adjudicative reasoning, but has devoted much less thought to the nature of legal doctrinal analysis. This is unfortunate for a number of reasons. The doctrinal writer does not take as his central task the resolution of a specific dispute, but the systematisation of a whole area of law. Consequently, features of legal thought bearing upon or constituting the systematic, principled aspect of law tend to be much more visible and conspicuous in the scholarly text than they might be in the judgment. Law's character as a body of standards exhibiting deep systematic properties is both puzzling and important: it is by no means obvious why we should find it natural to assume that law exhibits the properties of a system, what those properties might be, or how their significance should be construed. The doctrinal scholar does not claim to possess any formal, rule-based, authority: in this respect, the propositions in the treatise differ from those in a judgment. One consequence of this is that questions concerning the nature and objectivity of law are raised more starkly in the context of doctrinal writing than in the context of adjudication. To reflect upon the nature of doctrinal writing one must therefore address directly and in conjunction the law's objectivity and its systematic character.

Doctrinal writing is of great importance for the liberal polity. The body of doctrinal scholarship appears to testify to the existence of a sophisticated and coherent system of principles providing a distinctive framework within which disputes may be addressed. The suggestion seems to be that, when planted within the intellectual traditions of legal scholarship, the bare texts of statutory provisions and judicial pronouncements will blossom into a rich tracery of

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entitlements and juridical standards. Doctrinal writings provide a broader context that helps to underpin and appears to justify judicial choices within the area of penumbral uncertainty. Yet we may upon reflection have the troubling sense that all of this appears to be achieved only by stepping beyond the limits of what the scholar claims to be doing: that is, offering an exposition of the existing law.

Suppose that we adopt the Hartian view that rules have both a "core of settled meaning" and an area of "penumbral uncertainty". The area of penumbral uncertainty may seem relatively untroubling when we contemplate its implications for our account of adjudication. For, in addition to rules of recognition that identify the law's content, there is also a need for rules of adjudication that authorise persons to give binding decisions concerning the applicability of rules. When judges decide penumbral cases, therefore, their decisions do not lack legitimacy, for the legitimacy of those decisions is derived from rules of adjudication even when it may not be derived from the rule of recognition; and, if penumbral uncertainty is unavoidable, and the reasons given for the resolution of the penumbral case are good reasons, there may seem to be little here that is troubling. Certainly this will be so if the great bulk of human situations (by which we do *not* mean the bulk of litigated cases, still less reported cases) fall within the "core of settled meaning" of the rules.

Nor should we be troubled by the suggestion that, if problematic cases actually fall within areas of penumbral uncertainty and therefore do not have outcomes prescribed by law, the judicial citation of laws and legal principles in such cases is somehow bogus. When a penumbral case is judicially resolved, the law is supplemented by the addition of a specific rule where none formerly existed.[1] Prior to the decision in *Bully* v. *Brat* we did not know if the word "vehicle" in the Municipal Park (Prohibition of Vehicles) Regulations applied to a kiddy-car or not; now we know that it does. There was a gap;[2] now it has been filled. In deciding how best to fill such a gap, the judge naturally has to pay close attention to the system of rules into which his new creation will be introduced. He does not wish to introduce a rule that will conflict with other rules, or defeat the values or policies that they serve; nor

[1] I am thinking here of a system that includes a doctrine of precedent. In the absence of such a doctrine, judicial resolution of a penumbral case may add to the law only by creating a rule binding upon the specific parties to the litigation (*res judicata*).

[2] Some people may hesitate to describe this as a "gap". In fact, penumbral uncertainties of this type account for the only gaps that legal systems typically contain. Legal systems generally have closure rules (such as "everything that is not prohibited is permitted") and therefore cannot contain juridical vacuums, except by virtue of the penumbral uncertainty of rules.

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does he wish to create a set of requirements on conduct that will be unduly or insufficiently demanding.[3]

When we switch the focus to doctrinal writing, however, the problem assumes a less tractable guise. The doctrinal writer offers certain propositions as statements of the existing law. Typically, some of these statements concern the proper resolution of penumbral cases, either specifically, or as a general implication of a broader interpretation being proposed. Yet the doctrinal writer has no formal, rule-based authority on which such proposals can be grounded. If his statements go beyond what is warranted by the core of settled meaning of the legal rules, how can they be justified? More specifically (for the scholar may have good reasons for his favoured interpretations), how can they be justified as propositions of the existing law?

It might seem, therefore, that the doctrinal writer is committed to denying Hobbes' claim that it is not reason, but authority, that makes a law.[4] It seems as if the doctrinal writer is assuming some conception of law under which good reasons can ground legal validity; whereas, on the Hobbesian view, the scholar's reasons for favouring one resolution of a penumbral case as against another contribute not one jot to a demonstration that the law has in fact resolved the case that way. If the doctrinal writer is indeed committed to such a denial, it would not be surprising: for the legal treatise was, in origin, an heir to the tradition of modern natural law that began with Grotius. Hobbes addressed many of the same problems as Grotius, but his positivism proposes a different solution to the problem of juridical order in a modern political community. The tradition of positivism was ultimately to yield a conception of doctrinal scholarship quite different from that of Grotius and his successors.

The history of systematic doctrinal scholarship is not coterminous with the history of law: not even with the history of written law. There have been legal orders that lacked any such body of scholarship: ancient Greek law is one example; and the legal order of medieval Europe may be another.[5] The arguments of

[3] Nor should we be troubled by Dworkin's argument that such considerations will explain "consistency in strategy" but not "consistency in principle": Ronald Dworkin, *Law's Empire* (Fontana, London 1986), p. 134. Some good reasons for pursuing consistency of principle are outlined by Jeremy Bentham. See Bentham, *Principles of the Civil Code*, Chap. 17: "When once the laws have been established ... upon a principle generally admitted, any further arrangement consistent with that principle will naturally be found to conform with general expectation. Every analogous law is, so to speak, taken for granted beforehand, and every new application of the principle helps to confirm and strengthen it."

[4] Hobbes, *Leviathan*, Chap. 26.

[5] Medieval Germanic law was described by Romanists such as Sohm as "ein Recht ohne Rechtswissenschaft": J.W. Jones, *Historical Introduction to the Theory of Law* (Clarendon Press, Oxford 1940), p. 1.

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this essay are not intended as a general thesis about doctrinal analysis whenever and wherever it has occurred. Rather, the essay is concerned with the forms of doctrinal analysis that began to come to prominence in early modern Europe, and that have become a taken-for-granted feature of present-day legal systems. A different type of theory might be needed to fit Roman legal science.[6]

I take systematic doctrinal scholarship to be, not simply any compilation of legal information, but the exposition of law in a form structured by substantive principles. The doctrinal scholar purports to reveal something about the law that would not be obvious from superficial consultation of its disorderly legislative and judicial materials. The categories employed are intended not simply as convenient boxes into which information can be slotted, but as a conceptual framework that casts light upon the significance of that information. Thus, specific rules are presented as instantiations of more general principles, and those principles may be invoked so as to inform interpretation of the rules. Principles may be thought of as constructed or discovered by the scholar, or as to be found in explicit form amongst the extant legal materials. If the latter view is adopted, the scholar is viewed as simply assembling the law into an enlightening form; if the former view is adopted, the scholar is thought of as drawing out the law's implicit content.

Since not every legal order has encompassed practices of systematic doctrinal analysis, there are some interesting questions concerning the presuppositions underlying those practices, and the social, intellectual and juridical conditions that foster them. Early modern juristic scholarship emerged in a context of sovereign powers that appeared to stand in separate isolation upon a landscape recently denuded of the older moral and religious ideas. The withering of those older ideas meant that sovereign authority was no longer perceived as part of a divinely established hierarchy of governance. Sovereign authority was now seen as a product of artifice: in the absence of such artifice, men would stand as juridical equals. The derivation of political authority from juridical equality became a central task for political philosophy. For doctrinal

[6] My own (ill-informed) suspicions are that, in the case of Roman law, the activities of the jurists have to be understood at least in part as aiming at an articulation of customary notions of proper conduct, within a context structured by specific enactments and adjudicative procedures. Such juristic articulation of customary standards serves, not only to relate the customary background to the more formal enactments and procedures, but also to stabilise the customary understandings themselves, by giving to them some authoritative statement. Later developments such as the *ius respondendi* and the Law of Citations were attempts to stabilise the stabilisers, by reducing uncertainty about which juristic statements were to be regarded as authoritative.

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scholarship, the central problem came to be the reconciliation of fundamental juridical equality with the actual inequalities of right that structured civil society.[7]

In this essay I propose to offer some reflections upon the emergence of modern forms of doctrinal scholarship. I shall argue that these forms emerged in tandem with new conceptions of the polity, and a new division between questions of justice and right (on the one hand) and of excellence and virtue (on the other). This bifurcation promoted systematic doctrinal legal thought to a position of great importance; but it also cast into eclipse the notions of practical wisdom that might best have informed the legal scholar's activities. Understanding of the situation has been impeded, I shall suggest, by the dominance of arid questions and misleading categories within the philosophy of law.

A watershed

A significant and much remarked watershed divides the history of political thought. What is not often noticed is the fact that this watershed is closely bound up with the problem of legal doctrine and juristic commentary. Two of the principal figures in the newly emergent form of political thought, Grotius and Hobbes, each exhibited an intense concern with the nature and possibility of doctrinal scholarship. Such a concern was not merely peripheral to their political thinking but sprang from its core assumptions.

In seventeenth century Europe, the framework of Aristotelian and scholastic political and metaphysical thought was under attack. Both Grotius and Hobbes helped to initiate a significant break with the older approaches. In the case of Grotius this was done by certain significant but specific departures from Aristotle, aimed at exposing deficiencies in Aristotle's analysis of justice, and at separating the realm of juridical ideas from the broader ethical domain of practical wisdom. Hobbes, by contrast, mounted a wholesale attack upon virtually every aspect of Aristotle's thought. The resulting theories gave a new centrality and distinctness to juridical thought and institutions, but conceived of the juridical realm in quite different ways. Hobbes was to emphasise law's status as a product of legislative will, creating juridical order in a void where the demands of reason would otherwise lead men into unbounded conflict. Grotius, while not dissenting from the need for powerful authority, viewed authority as necessary for the protection of mutually consistent rights that were not themselves the product of artifice or authority.

[7] Simmonds, *The Decline of Juridical Reason* (Manchester 1984), Chap. 3.

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In consequence of these views, Grotius was to become a founding father of the major tradition of doctrinal scholarship; while Hobbes adopted a critical posture towards all forms of legal commentary, admitting room for no commentator other than the sovereign authority itself. In due course, both the Grotian model and its direct heirs were to be revealed as resting on sand. This invited an effort to reconcile doctrinal scholarship with the legal positivist vision of Hobbes: an effort was made to convert the negative Hobbesian view of legal scholarship into a rigorous and austere conception of positivist "legal science". More recently, attempts have been made to revive something approximating to the Grotian model. Thus, Grotius and Hobbes not only created a context of political ideas that gave centrality to doctrinal analysis, but also established the polar opposites that were to determine its future history. Our present task, however, is to explain the nature of the watershed from which these developments sprang.

The approach to politics that we find exemplified in Aristotle's *Politics* places questions of excellence at the centre. The Aristotelian asks what would count as an excellent, valuable, worthwhile way of life for a human being; institutions such as property, the family, and the rule of law are scrutinised and interpreted by reference to their capacity to encourage and inculcate excellent lives. This is not to say that reflection on politics can be divided into two separable stages: first the reflection on excellence, and then the selection of excellence-inculcating institutions. Human nature is viewed as essentially social, and therefore as finding expression in the fabric of established institutions. One reflects upon institutions the better to understand the human nature to which they give real (if sometimes distorted) expression; one also draws upon that same human nature in seeking such understanding. An interpretation of our human nature then yields a conception of excellence, which provides a standpoint from which institutions can be understood, evaluated and criticised.

On this view an understanding of the good not only guides our practical deliberations on what we ought to do, but also renders intelligible the actions of others: we attain a genuine understanding of what has been done, or of what a certain practice amounts to, when we understand how these actions and practices are related (wisely or misguidedly) to what Finnis aptly calls "the forms of human flourishing."[8] Thus, the practical wisdom that should guide our conduct also provides us with intellectual access to the world of human history and institutions.[9]

[8] John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980).

[9] This essay argues that many of the problems of doctrinal scholarship have sprung from the agenda set by the early modern Protestant jurists. It does not explore the hypothesis that those

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Just as the investigation into excellence is not detached from the reflection upon political institutions, but informed by it, so the Aristotelian would not view his reflective moral engagement with the fabric of human life as requiring legitimation by some independently certified epistemology. Modern philosophy, since Descartes and Locke, has tended to give priority to epistemological inquiry, and to regard the possibility of moral knowledge as limited by the results of such inquiry. To a more ancient way of thinking, however, our ability to know and understand a range of human goods, institutions and forms of excellence would illuminate our epistemic inquiries as much as vice versa.

The sense that an Aristotelian understanding of law and politics rests upon an unacceptable metaphysics and an unduly restrictive view of human nature explains much of the modern hostility to the approach. In fact, the extent to which the Aristotelian approach relies upon an invariant notion of the human good is unclear. For some Aristotelians, goods may be plural and need not be transcendent; our knowledge of the good may be inseparable from our comprehension of its variable manifestations;[10] in any case, practical wisdom will be guided at every point by understandings that are essentially local and particular.

The form of political thinking that emerged in the seventeenth century was one that sought to entrench a distinction between the juridical realm of rights and justice, and the ethical realm of virtue, prudence and practical wisdom. Different versions of this endeavour were offered by Grotius and by Hobbes, as well as by many other thinkers. Aristotelian notions of government and law as inculcating a form of excellence realisable only in the political realm were replaced by ideas of government and law as providing a framework within which diverse projects or conceptions of excellence might be pursued. Both Hobbes and Grotius inhabited a world in which traditional ideas of the common good and the *summum bonum* had become contentious and uncertain. Widespread scepticism made such notions an unreliable starting point for one's approach to law and politics. The question both writers address concerns the sense that is to be made of law's claims to objectivity and binding force once such traditional notions are set on one side, and we have little

problems might have been overcome by a more classical Aristotelian approach. A suggestion to that effect is, perhaps, an unstated theme of John Finnis's fine essay "Blackstone's Theoretical Intentions" (1967) 12 Natural Law Forum 163 at p. 181. See also James Gordley, *Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, Oxford 1991).

[10] "The shape which the concept assumes in its actualisation ... is essential for cognition of the concept itself." G.W.F. Hegel, *Elements of the Philosophy of Right*, translated by H.B. Nisbet, (Cambridge 1991), Section 1.

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to work from except the fact of individual desires for self-preservation.

For the Aristotelian tradition, law occupied an important but not pre-eminent place within the political community. Institutions such as the family, property and the public realm of government were to be judged by their capacity to foster and realise excellent lives. Since man was essentially social, such lives were conceivable only in community with others. Law was necessary to sustain such institutions, to inculcate virtuous habits of conduct, and to protect the virtuous from the predations of the wicked. The interpretation and application of law was to be guided by the same practical wisdom that provided the virtuous agent with his understanding of the good. A shared focus upon the common good informed the law and united the polity into an integrated whole.

The modern idea of politics, by contrast, makes law central. For, within that conception, a good that can be realised only in common is overshadowed or replaced by diverse individual goods that are in competition with each other. If each person is to have an opportunity of pursuing his or her own notion of a worthwhile life, each must enjoy some sphere of liberty or entitlement within which appropriate choices may be made and executed in action. The demarcation of such entitlements cannot itself be informed by any notion of the common good: it must be the task of law and of specifically juridical conceptions. Yet how is this possible? How can we hold a body of laws in common when we share nothing else? Two main answers were offered. One, offered by Hobbes, viewed law as grounded in the enactments of a sovereign. The other (offered by Grotius), while not denying the need for sovereign authority, emphasised the reality of a system of rights that is logically prior to such authority, and viewed law as the articulation of that system. These two motifs were to characterise much of the juridical thinking that followed upon the decline of scholastic thought.

Grotius, Hobbes and the departure from Aristotle

The scholastic tradition of political thought that drew its sources of inspiration from Aristotle's *Politics* tended to assume a relatively integrated community united by bonds of common belief. It is therefore impossible properly to understand the nature of Grotius's contribution without an awareness of the new form of international society that was emerging in the Europe of his day. Even the title of his principal treatise, *De Iure Belli ac Pacis*, points directly to Grotius's central concern with the standards governing sovereign

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states in their dealings with each other. In medieval Europe, powers and jurisdictions were multiple and overlapping; but, with the emergence of the early modern state, a different situation became evident. Modern states claim exclusive territorial jurisdiction, and therefore regard the laws of other states as having no claim upon them. The nature of the moral or juridical relations obtaining between these exclusive zones therefore assumed a problematic appearance: some might conclude that states could only stand to each other in postures governed by prudence and self-interest, rather than right or law. Theories of natural law that explored the moral relations obtaining between such autonomous entities naturally suggested the possibility that moral relations between individuals within the state could be conceived of in a similar way: theories suited to the newly emergent international order therefore fostered new forms of individualism in political thought more generally. The fragmentation of Europe's religious inheritance made such individualism seem desirable as an approach.

Grotius endorses several aspects of Aristotle's thinking, but rejects any idea that rights and duties can be derived from considerations of the common good. Thus, Aristotelian distributive justice is said not to concern "justice properly and strictly so called" but virtues such as "generosity, compassion and foresight in matters of government".[11] Law is properly concerned only with expletive (or corrective) justice, and its essence lies in respect for the *suum* of others. Similarly, Grotius rejects the view that governmental authority depends upon the extent to which a form of government can claim to foster some contentious conception of the human *telos*, salvation, or the common good. Thus he observes that "Just as, in fact, there are many ways of living ... and out of so many ways of living each is free to select that which he prefers, so also a people can select the form of government which it wishes; and the extent of its legal right in the matter is not to be measured by the superior excellence of this or that form of government, in regard to which different men hold different views, but by its free choice."[12]

Grotius is often regarded by lawyers as the father of international law; but one might make out a good case for regarding him as the father of modern doctrinal scholarship. Older forms of legal writing had addressed a legal order that was chaotic and particularistic. The complex inequalities that composed the political fabric of the community had not been viewed as the consequence of applying to differing circumstances some body of

[11] *De Iure Belli ac Pacis*, 1.1.8.1.
[12] Grotius, *op. cit.*, 1.3.8.2.

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juridical principles that conferred upon people (at some very abstract level) equal rights. Consequently, there was no thought that doctrinal writing might endeavour to set out the detail of law in a way that reflected those general principles. Legal writing for the most part took the form of loosely assembled compendia of legal information: the formulary, and the gloss. Grotius was one of the first scholars to explore the idea that a legal system might be studied and expounded systematically precisely in so far as the law enforced natural rights enjoyed equally by all.[13]

The work of Hobbes parallels that of Grotius in a number of respects. Like Grotius, Hobbes derives his justifications of political authority from assumptions concerning human equality, rather than from any set of claims about the establishment of such authority by God, or its descent from Adam; like Grotius, he places a central emphasis upon the individual's right of self-preservation, rather than upon a collective good, or a *summum bonum*; and, like Grotius, he mounts a sustained attack upon Aristotle. Nevertheless, the differences between them are such that their theories ultimately gave rise to quite different traditions of juridical scholarship.

For Grotius, rights constitute domains of self-ownership, within which one may order one's own actions (the *suum*).[14] One has a right to advance one's own interests, but only provided that the rights of others are not infringed.[15] Actions that encroach upon the *suum* of another are violations of right. One may defend oneself even against an innocent aggressor, since the legitimacy of self-defence lies in the rights of the victim and not the wrongs of the assailant;[16] but such a right of self-defence obtains only against a certain and immediate threat, not merely against one that is anticipated or assumed.[17] The picture presented by Grotius is therefore one of a realm of non-overlapping compossible rights: when one acts within the scope of one's rights, one cannot, in doing so, be violating the rights of others.

The position of Hobbes is quite different. Hobbes famously *contrasts* "right" and "law", saying that they differ as much as do "obligation" and "liberty": for "Right consisteth in liberty to do or forebear; Whereas Law determineth, and bindeth to one of them."[18] For Hobbes, each person in the state of nature has a right to everything, "even to one another's body".[19] Law for Hobbes is

[13] Simmonds, *The Decline of Juridical Reason* (Manchester 1984).
[14] *De Iure Belli ac Pacis*, 1.1.5.
[15] Grotius, *op. cit.*, 1.2.1.6.
[16] Grotius, *op. cit.*, 2.1.3.
[17] Grotius, *op. cit.*, 2.1.5.
[18] Hobbes, *Leviathan*, Chap. 14.
[19] *Loc. cit.* One sometimes hears it said that, by "right" Hobbes means a Hohfeldian liberty or privilege. This is true to the extent that his "right" is constituted by the absence of any

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necessary to make social order possible, but in doing so it does not fulfill the requirements of any underlying structure of rights: it simply restricts or abrogates rights. For Grotius, on the other hand, rights indicate the possibility of a non-conflictual social order; positive law should trace out the content of non-conflicting rights, and it presents a systematic structure in so far as it reflects that order.

Some recent scholars, such as Richard Tuck,[20] have argued that the contrasts between Grotius and Hobbes are not great, for both of them reject the Aristotelian framework of thought, and both of them work from a basic right of self-preservation, rather than from any notion of commonality or shared good. In fact, Tuck greatly overestimates the extent to which Grotius rejects Aristotelianism.[21] He construes Grotius as offering a general rejection of Aristotle's emphasis upon *phronesis*, the never-fully-articulable practical wisdom of the virtuous agent, and informs us that Grotius was offering in its place "a definite and a priori science of ethics ... in which there will be little room for individual judgement".[22] Such an interpretation might at first seem to be supported by Grotius's criticism of Aristotle's doctrine of "the mean",[23] as well as by Grotius's invocation of the model of mathematics. The appearance, however, is misleading. For, far from rejecting Aristotelian notions of practical wisdom in order to construct a moral science characterised by certainty, Grotius expressly concurs in Aristotle's ascription of relative uncertainty to moral questions.[24] Nor is it true that Grotius rejects Aristotle's doctrine of the mean without reservation: he rejects only the application of the doctrine to

obligation. I have pointed out elsewhere, however, that a Hohfeldian liberty should not be thought of as a residual element of the liberty of the state of nature, surviving the tide of legal regulation. Hohfeldian liberties are entities that exist only in a realm of jural relations, constituted in part by precisely such regulation. This is one reason for following Hohfeld's own practice of referring to them as "privileges" rather than "liberties". See Kramer, Simmonds and Steiner, *A Debate Over Rights* (Oxford 1998) p. 167.

[20] See Richard Tuck, *Philosophy and Government, 1572–1651* (Cambridge 1993); Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (Oxford 1999).

[21] In what follows I ignore those of Tuck's arguments which rely upon differences between the different editions of *De Iure Belli ac Pacis*. Even though the later edition may contain more clearly Aristotelian formulations than does the earlier edition, I see no compelling reason to ascribe these changes (as does Tuck) to Grotius's desire to rehabilitate himself with the Aristotelians of his native land, by concealing his wholesale rejection of Aristotle. They are equally consistent with a more straightforward desire to clarify the precise nature of his limited and specific departures from Aristotle (whether or not such clarification was undertaken as an exercise in rehabilitation).

[22] Richard Tuck, "Grotius and Selden" in J.H. Burns (ed.), *The Cambridge History of Political Thought, 1450–1700* (Cambridge 1991) p. 499, at p. 518.

[23] *I.e.* the idea that virtue is a mean between extremes. See Aristotle, *The Nicomachean Ethics*, Book 2.

[24] *De Iure Belli ac Pacis*, 2.23.1. For Pufendorf's attempt to deal with this Grotian acknowledgment, see Pufendorf, *De Iure Naturae et Gentium* (edition of 1688), Book 1 Chap. 2.

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justice,[25] accepting in relation to other virtues that "right reason, which virtue everywhere follows, in some things prescribes the pursuing of a middle course".[26] The point of Grotius's (limited) attack upon the doctrine of the mean is not to create a moral science exhibiting certainty and devoid of the need for practical wisdom, but to undermine the Aristotelian notion of distributive justice: the doctrine of the mean clearly makes more sense when applied to distributive justice than when applied to corrective or commutative justice.[27]

Grotius's invocation of mathematics has often misled his commentators into thinking that he was proposing a mathematical science of morals. The immense prestige enjoyed by mathematics as an exemplar of human knowledge did lead later writers such as Pufendorf to adopt some such view.[28] Grotius's observations must be read in context, however. He tells us that "just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact".[29] The claim is expressly made to rebut the suggestion that he is simply concerned to intervene in current political controversies (such controversies having in the recent past led to Grotius's imprisonment and to the execution of his benefactor Oldenbarnevelt). This seems an insufficient basis for the attribution of an extravagant epistemological thesis to Grotius.

Nor does the fact that Grotius relies upon a fundamental right of self-preservation serve to reduce the distance between his theory and that of Hobbes. It is important not to overlook the crucial differences that exist between the theories, for they serve to place the two thinkers at the foundation of quite different traditions of legal thought. Hobbes' right of self-preservation is a right to do anything that one *believes* is necessary for one's preservation;[30] whereas Grotius's right is a right to do what is *in fact* so necessary.[31] The subjectivity of the Hobbesian test may rob the right of any genuine content (thereby explaining Hobbes' claim that

[25] Grotius points out that justice cannot be a mean, for it cannot be unjust to accept less than one is due: justice in his view consists in abstaining from that which is another's: Grotius, *De Iure Belli ac Pacis*, Prol. 44.

[26] Grotius, *op. cit.*, Prol. 45.

[27] See Simmonds, "Grotius and Pufendorf" in Steve Nadler (ed.), *The Blackwell Companion to Early Modern Philosophy* (forthcoming).

[28] Thus Pufendorf seeks to confine the validity of Aristotle's remarks on the lack of moral certainty to the realm of prudent concern for individual and collective welfare, distinguishing this from questions of rectitude according to natural law; he seeks to explain Grotius's acknowledgment of the uncertainty of moral affairs by reference to a distinction between the abstract clarity of moral concepts and the complex circumstances in which they must be applied. See Pufendorf, *loc. cit.* n. 24 above.

[29] Grotius, *op. cit.*, Prol. 58.

[30] *Leviathan*, Chap. 14, (opening paragraph).

[31] The threat must be certain: Grotius, *op.cit.*, 2.1.5.

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"the notions of Right and Wrong, Justice and Injustice" have no place in the state of nature[32]); at the very least it ensures that Hobbesian rights will be inherently and pervasively conflicting while Grotian rights will not.[33]

By contrast with Grotius, Hobbes never rests from his ceaseless attacks upon Aristotelian thought. Here we find, not a strategic attempt to separate off the realm of law and justice from the realm of prudence and practical wisdom, but an attempt to ground the former in a distinctive vision of the latter realm.[34] Hobbes' conception of philosophical method is perhaps not entirely coherent, but his aspiration was clearly to offer an argument of deductive reasoning from certain fundamental "definitions" or axioms, even though he viewed such argument as yielding only "conditional" knowledge.[35] With such a conception of the possibilities of genuine knowledge, it is perhaps not surprising that Hobbes views with suspicion or even contempt all of those aspects of human understanding that depend upon broader, more "hermeneutic", considerations. His concerns with the destabilising capacities of interpretation, and the dangers of textual ambiguity, are a pervasive theme in his work.[36] It is from these latter concerns that Hobbes' remarks on legal doctrinal commentary spring.

For Grotius, juridical thought articulates the demands of reason implicit in man's desire for society; such dependency upon reason serves to underpin the doctrinal scholar's role. For Hobbes, reason is individual reason: it is not the "right reason" that was viewed by Aristotelians as informing human communities, practices and history in ways not reducible to the reasoning of individuals.[37] Hobbes therefore begins by reminding us that "our Lawyers are

[32] *Leviathan*, Chap. 13.

[33] This is not to say that Grotian rights are wholly free from potential conflict. Thus Grotius allows for self-defence against a wholly innocent attacker, since the right of self-defence "has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor": *De Iure Belli ac Pacis*, 2.1.3. In such instances the innocent attacker's right to bodily integrity conflicts with the defender's right to act in self-defence. Such specific situations of potential conflict, however, do little to reduce the importance of the general contrast between Hobbes and Grotius on the matter of conflict between natural rights.

[34] The Hobbesian "Laws of Nature" are not, of course, instantiations of Aristotelian practical wisdom, but they do resemble Aristotelian ethics in so far as they are poised carefully between the notions of duty and prudence: see *Leviathan*, Chaps. 14 and 15.

[35] *Leviathan*, Chap. 7.

[36] As Matthew Kramer aptly observes, "To encounter the work of Thomas Hobbes is to encounter a deep aversion towards ambiguity." Matthew H. Kramer, *Hobbes and the Paradoxes of Political Origins* (Macmillan 1997), p. 55.

[37] Hobbes discovered that social situations could possess a logic inexorably determining action and shaping collective outcomes contrary to the will of any individual: the logic of the pre-emptive strike. Later writers, such as Adam Smith and Karl Marx, were to discover that such structural logics could be benign (Smith's "invisible hand") as well as malign (Marx's "change in the organic composition of capital"). In Hegelian hands, such ideas become the "cunning of reason", and the restoration of a non-individualistic notion of Reason is then well under way.

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agreed" upon the proposition "That Law can never be against reason"; but he goes on to ask "whose Reason it is, that shall be received for Law". It cannot be the private reason of any man, "for then there would be as much contradiction in the Lawes, as there is in the Schooles"; only the reason of the sovereign will serve. Consequently, "it is not that *Juris prudentia*, or wisedom of subordinate Judges; but the Reason of this our Artificiall Man the Common-wealth, and his Command, that maketh Law."[38]

Having thus placed in doubt the jurist's characteristic appeals to "reason" Hobbes moves to the matter of interpretation, arguing that the only way to avoid endless interpretative disputes is to rely upon authoritative interpretation by the sovereign: "For Commentaries are commonly more subject to cavill, than the Text; and therefore need other Commentaries; and so there will be no end of such Interpretation."[39]

An essentially modern view of the political community could therefore give rise to quite different understandings of law and legal scholarship. On the one hand was a tradition that viewed law as the gradual working out of principles that trace the structure of a pre-existing, if inchoate, body of rights. This tradition could ascribe an important role to the doctrinal writer, whose task was (so far as possible) to present each individual rule as one fragment of the broader system of right.[40] The underlying theory of rights could guide the interpretation of rules, and the resolution of disputes that appeared to fall clearly within no established rule.

On the other hand was a Hobbesian tradition, emphasising the groundedness of law in authority, and problematising or rejecting the role of the non-authoritative doctrinal writer. In the long term, and as a consequence of the failure of the Grotian model, this tradition was to generate its own style of doctrinal scholarship, that sought to trace every proposition to an authoritative source. The emergence and assessment of such a tradition, however, was dogged by confusion, as legal theory shifted its agenda of problems in such a way as to obscure the most pressing issues concerning doctrinal analysis. The term "legal positivism", in particular, came to be associated with a set of claims concerning the absence of necessary conceptual connections between law and morality. The new "legal positivists" were sometimes not unwilling to view themselves as the heirs to a tradition stemming from Hobbes; and this in spite of the fact that, on their conception of "legal positivism", Hobbes was

[38] *Leviathan*, Chap. 26.
[39] *Loc. cit.*
[40] See Simmonds, "Reason, History and Privilege: Blackstone's Debt to Natural Law" [1988] Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte 200.

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almost certainly not a legal positivist (it being far from clear that he would, or could, deny the existence of "necessary connections" between law and morals). The confusion stemming from these shifts is still with us. More seriously, however, the debate over the issue of necessary conceptual connections has focused attention upon matters the importance of which we might doubt, while obscuring the existence of a set of pressing and genuinely significant problems.

To this matter of the shift within jurisprudence we now turn.

Legal Theory and Protestant Autonomy

One can well understand the hostility which conventional doctrinal scholars often exhibit towards legal theory: for a fair proportion of twentieth century legal theory has been aimed at demonstrating the impossibility of what judges (and therefore doctrinal scholars) seem to claim to do. The reasons for such jurisprudential scepticism are not far to seek. Do not judges claim to discover the correct meanings of texts? Do they not propound the principle which is implicit as well as the text which is demonstrable? And are those discoveries of proper meaning and underpinning principle not vital elements in a process of justification which leads to the imposition of the state's coercive sanctions? A century in which local scepticisms about meaning and value have been reinforced by more global scepticisms about objectivity and truth could not fail to be provoked by such a combination of proclaimed intellectual authority backed by the cool facts of organised force.

Some more specific developments have also served to make the practice of doctrinal scholarship an anxiety-ridden one, unless it is pursued (as it all too often is) with a glistening protective veneer of anti-intellectualism. The project of ordering the positive law by reference to an underlying system of mutually consistent rights reached its most sophisticated flowering in a form that looked to Kant's *Metaphysics of Morals* for inspiration. Jurists were, however, ultimately to discover what philosophers such as Hegel and Schopenhauer had long ago perceived: that Kant's notion of "equal freedom" (upon which his theory of justice and rights depends) is wholly empty. There is no metric for freedom, and therefore no worthwhile notion of "equal freedom". One cannot compare freedoms by relative *extent*, but only by importance; yet the evaluation of the importance of freedoms introduces questions of excellence and value of precisely the kind that Kant had hoped to exclude from his theory.[41]

[41] See Kramer, Simmonds and Steiner, *op. cit.*, p. 136. The applicability of the same criticism to modern liberals such as Rawls was pointed out by H.L.A. Hart. See Hart "Rawls on Liberty

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If Kant's philosophy of right had served to inspire doctrinal scholarship, his moral philosophy was subtly to undermine it. The older tradition of jurisprudential thought, exemplified by writers such as Grotius, had reflected upon the character of juridical and political institutions as an expression of our moral nature. The task of the doctrinal scholar could therefore be seen as but a natural continuation of their own, more philosophical, engagement with law. Retaining the Aristotelian view of humanity as essentially social, such late scholastics and early Protestants as Grotius found it natural to regard our moral nature as articulated in the form of our institutions. Such assumptions were fundamental to the Grotian origins of systematic doctrinal scholarship. The inwardness of Protestantism, however, was to undercut this position and encourage a perspective that regarded actual institutions as potential threats to autonomy, rather than as anchors of moral reflection. Kant's emphasis upon the detached and categorical nature of morality, ungrounded in either practice or desire, and the related detachment of the "noumenal" self, rendered older forms of jurisprudential reflection unintelligible.[42] The consequence of this Kantian perspective was a sense that only two forms of inquiry were possible, or even conceivable, for the philosophy of law.

One was a normative inquiry, where we might seek to construct a general theory about what we ought to do, what laws we should enact, and so forth. From the perspective of such a purely normative theory, actual laws and institutions were to be regarded as "mere" facts without intrinsic moral worth. "Even the Holy One of the gospel" must be measured against our own ideal standards (Kant tells us) before we can take him as a moral guide.[43]

The other enterprise that survived Kant's grounding of morality in individual autonomy and radical detachment was an exercise in conceptual clarification, where we ask such questions as whether there are necessary conceptual connections between law and morality. We cannot draw our evaluative understanding from a

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and its Priority" in *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford 1983). For the inadequacy of the Rawlsian response, see John Gray, *Two Faces of Liberalism* (Polity, Cambridge 2000) Chap. 3.

[42] When not viewed as simple instances of confusion, they come to be seen as debates structured by a mysterious convention that requires "political and moral ideals" to be put forward "as versions of the meaning, definition, or function of law." See Tony Honore, *Making Law Bind* (Clarendon Press, Oxford 1987) p. 32.

[43] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (various editions and translations). One might wonder how this emphasis upon abstract detachment and inwardness is to be reconciled with the interest in doctrinal legal categories that pervades Kant's "Doctrine of Right" in *The Metaphysics of Morals*. The answer must be, I think, that Kant views law as the working out of the conditions in which equal freedoms can be jointly possible: the conditions of equal freedom cannot be known in the abstract, but only through the manifest result of detailed efforts to implement those conditions.

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knowledge of facts, even facts concerning the most basic practices and social institutions: for values are grounded in our capacity for radical detachment from such facts. Nor can philosophy concern itself with the mere reporting of facts, for philosophy's concern is in the realm of the necessary, not the contingent. What then is left? Only a set of questions about *meanings* or *concepts*. In particular, philosophy can scrutinise the concepts in terms of which we report and evaluate facts, seeking to clarify such concepts and render them more perspicacious than they might otherwise be. In this way, it is thought, muddle can be reduced, and factual and evaluative questions can be addressed without the issues being unnecessarily obscured.

Each of these forms of inquiry is dogged by serious problems. Once the most ambitious rationalist endeavours are seen to fail, the normative enterprise leaves us little to rely upon beyond our intuitions. This dependence upon intuition alone follows from the insistence upon treating the actual features of history and practice as "mere" facts without intrinsic moral significance. Yet the very intuitions upon which we are invited to rely are without doubt powerfully shaped by the histories and institutional contexts from which this approach likes to emphasise its detachment. When unsustained by the belief that intuitions represent a form of insight into a special realm of moral facts, the modern focus on intuition sits uncomfortably with an espousal of radical detachment as the appropriate posture for moral theory.

Applied to the concepts that form our moral and legal discourse, the conceptual inquiry tends to stumble over the fact that such concepts are rarely based upon sets of necessary and sufficient conditions that the philosopher can simply unearth and lay before us. More commonly, the discourse can be conceptually regimented in a variety of ways, with choice between the alternatives depending upon what we consider to be most important. Since what we regard as "important" depends upon our purposes, such conceptual clarification is of value only when relative to some particular argument or inquiry. The idea of an all-purpose enterprise of conceptual clarification is, in the context of law and morality, misguided. There is, in any case, no convincing evidence of conceptual confusion needing to be dispelled by this enterprise. Such theorists often choose to treat as conceptual confusion that which others know to be unconfused substantive moral debate. They therefore find ample evidence of a need for their services, when other observers might find none.[44]

[44] Simmonds, "The Ethics of Legal Positivism" (1999) 2 Legal Ethics 87, at pp. 98–103.

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Reflective understanding

The form of legal positivism that we find in Hobbes does not offer a clarificatory claim denying any necessary conceptual connection between law and morality; but nor does it offer a purely prescriptive claim about the form that legal institutions *ought* to take in an ideal world. While adopting a highly critical posture towards the practices and understandings of the common lawyers, Hobbes nevertheless seeks to offer a reflective understanding of the form of modern community that places law at its centre, and seeks to explain how law can be possible within the context of assumptions that underpins such a community. The later division of jurisprudential thought into analytical and normative inquiries gave rise to a re-thinking of legal positivism, however. On the one hand was a type of positivism that confined itself to a denial of necessary conceptual connections between law and morality. On the other hand was a type of positivism that *advocated* legal institutions exhibiting certain formal features.[45] Between these two alternatives, an important enterprise was obscured: the enterprise of *interpreting* our own political community.[46]

Confusion about the type of theory being offered is a common source of error in jurisprudence. More serious, however, is the dominance now assumed by conceptual clarificatory questions about the "separability" of law and morals (the denial of any necessary conceptual connection). Hart's work served to equate legal positivism with a set of responses to these questions; now it seems that to use the phrase "legal positivism" to refer to anything other than the denial of necessary connections is to invite accusations of simple ignorance or confusion.[47] The danger in all of this is that such dogmatism threatens to obscure a genuine and important set of questions about how we should reflectively understand our own institutions. A focus upon necessary connections is a most inappropriate way of addressing such issues,

[45] See Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth 1996).

[46] Dworkin has done much to restore this approach to jurisprudence, and to reject the flat division between analytical and normative inquiries, in his brilliant book *Law's Empire* (Fontana, London 1986). Unfortunately his account of the nature of interpretation is marred by the very perspective of Protestant autonomy that gives rise to the analytical/normative division in the first place.

In a series of articles commencing in 1978 (and also in my book *The Decline of Juridical Reason*, n. 8 above) I had myself been groping towards a more "interpretative" understanding of jurisprudence for some years before Dworkin produced *Law's Empire*. I mention this fact simply to avert the suggestion that I am climbing upon a Dworkinian "bandwagon". Other, more clumsy, bandwagons were rumbling in the same general direction quite independently of Dworkin, and mine was one of them.

[47] This has never deterred me from using the phrase in other, and to my mind more important, senses. See, for example, Kramer, Simmonds and Steiner, *A Debate Over Rights* (Oxford University Press 1998) p. 139n. See also Simmonds, "Between Positivism and Idealism" [1991] Cambridge Law Journal 308.

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for it invites us to test our conceptual conclusions against imaginary examples, while ignoring features that are central to our experience of law. Suppose, for example, that, in every legal system known to mankind, moral values were treated as relevant to legal validity: the Hartian positivist would remain unmoved by the discovery. Such connections between legal validity and moral value would, for the Hartian, be merely "contingent" connections grounded in the features of particular systems, not "necessary" connections grounded in the concept of "law" itself. Rather than examining the actual practices and histories that compose the available examples of legal systems, therefore, we are invited to ask ourselves what we *would* say were we to be confronted by an example of normative ordering that differed in this or that respect from every known instantiation of the phenomena of law. We might well feel that this is not the best way of seeking a reflective understanding of human society and human nature.[48]

In the face of this Procrustean division between analytical and normative inquiries, an effort is required to restore our sense of what a reflective understanding (of the type that I have in mind) might amount to. The best way of tackling this problem is to offer an example of a familiar type of dispute which appears to be neither a straightforward empirical disagreement, nor an analytic battle between rival versions of conceptual regimentation, nor yet a disagreement about what ought to be done. Let us take, therefore, an example that I have employed elsewhere.

Suppose that you and I have a mutual acquaintance, Smith, who frequently fails to keep appointments, and sometimes acts in ways that cause avoidable upset (of a fairly minor kind) to others. Yet Smith also sometimes performs acts of great generosity. I regard Smith as scatty, selfish and unreliable. Even his acts of generosity seem to me instances of self-indulgence, for his conduct is too lacking in consistency to manifest any serious and enduring concern for the situation of others, and appears to be responsive mainly to Smith's own whims and mood changes. You, on the other hand, see Smith as manifesting a vibrant, positive and spontaneous stance towards the world, and see my concern for duty, reliability and consistency as deadening and self-mutilating. You and I may have no dispute about the facts of what Smith has done, at some mundane level of description (he has often failed to keep appointments, sometimes been very generous, etc.): we disagree about what those facts amount to.

[48] Reservations somewhat similar to my own are expressed in a completely different context by Edward Craig, *Knowledge and the State of Nature* (Clarendon Press, Oxford 1990) pp. 14–15. See also Gerald F. Gaus, *Justificatory Liberalism* (Oxford 1996) p. 305 n. 9.

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Compare jurisprudential reflection upon the legal order. We are familiar with certain facts: judges cite cases and statutes as justifications for their decisions; they exhibit a deep concern for principle and consistency; lawyers frequently argue about what exactly the cases and statutes require in the context of the individual case, or more generally; they also disagree about what internal consistency in the law would require; legal scholars write systematic compilations of the legal rules, wherein they adopt different views about how they are best systematised and interpreted; etc. Such facts are evident. But what do these facts amount to? Is the lawyer's concern with rules and consistency grounded upon values of order and predictability, for example? Or is it better understood in terms of the value of equality? Is legal reasoning a technical matter of reconciling conflicts and contradictions between authoritatively formulated rules? Or is it an exercise in practical reason, guided at every point by the desire to do justice all things considered?

Consider now someone who comes up and tells us that we need, in relation to the first dispute, a clarified conceptual framework. Our dispute about the appropriate characterisation of Smith's behaviour strikes this observer as confused: the genuine questions that we might ask concern such matters as what has caused Smith to behave as he does, and whether his conduct is to be judged "good" or "bad". To address these questions sensibly we need (we are told) a perspicacious set of concepts in terms of which Smith's conduct may be described.

Such an intervention we might well consider to be extraordinarily simple-minded. There is no doubt or confusion in our minds about certain facts of the kind already set out: Smith breaks appointments, performs acts of unusual generosity, and so forth. But what do these facts amount to? Are they instances of a life-affirming spontaneity, or simply of a shabby selfishness? The suggestion that what is needed here is a neutral set of concepts in terms of which the facts can be represented appears to depend upon a form of moral voluntarism that regards moral judgment as an ungrounded exercise of will in relation to otherwise morally neutral facts.[49] There are of course metaphysical positions holding that, appearances notwithstanding, an ungrounded exercise of will upon neutrally describable facts is all that the situation of moral reflection can amount to; and such metaphysical views serve to echo the voluntaristic elements of popular culture. There is no

[49] It is therefore no surprise that most of the advocates of such "conceptual clarification" tend to be legal positivists. There is a natural affinity between positivism and moral voluntarism. See Simmonds, "The Ethics of Legal Positivism" (1999) 2 Legal Ethics 87.

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justification, however, for taking such familiar views to be an expression of unproblematic and incontestable common sense; such views not only fail to capture the phenomenology of our moral experience, but also render problematic the role of reason within morality.[50]

Would a similar intervention, in relation to the second debate, be any less misguided? We saw earlier that the Aristotelian approach to politics cannot be divided into a detached inquiry into excellence, followed by a set of prescriptions about how appropriate forms of excellence are to be supported and encouraged by the institutions of the polity. Conceptions of human excellence depend upon, or are partially constituted by, conceptions of human nature: and we do not know our own nature by introspection but by reflection upon our doings in the world. The Aristotelian reflects upon the institutions of law, government, property and family in reliance upon a twofold thought: that his practical (not theoretical) apprehension of the good underpins his capacity to elucidate the intelligibility of such institutions; and that the theoretical understanding that results helps to give an articulate character to the values that informed that understanding.

Even those who reject the classical Aristotelian approach (fearing, perhaps, that it may require an unacceptable background metaphysics) may nevertheless choose to pursue a broadly analogous strategy. In this case the strategy will work from a hermeneutic reconstruction of the values that underpin a particular community. Such approaches, of course, face their own problems.[51] It must be remembered, however, that the apparent alternatives may be more apparent than real: the reliance upon moral "intuition", so popular in modern political philosophy, may be at base a rather muddy and undisciplined way of reflecting upon the social forms that sustain those intuitions and give them content.

[50] When "ought" judgments are detached in this way from the contexts that would normally inform them, "ought" becomes (as Elizabeth Anscombe points out) a word of "mesmeric force" that contains no intelligible thought. Elizabeth Anscombe, "Modern Moral Philosophy" (1958) 33 Philosophy 1. Anscombe argues that this detached use of "ought" prevents "ought" from being inferred from anything, even from another "ought": for an inference requires a real predicate, not a word containing no intelligible thought. For the suggestion that the detached use of "ought" may provide the source for Kelsen's later normative irrationalism, see Simmonds, "Normativity and Norms" (2000) 13 Ratio Juris 216 at p. 227.

[51] One problem springs from the fact that the choice between rival interpretations may seem to require appeal to a deeper level of significance, thereby generating an infinite regress. For this danger, see Simmonds, "Imperial Visions and Mundane Practices" [1987] Cambridge Law Journal 465. Another problem springs from the sense that moral positions must be grounded in considerations that are independent of any social practice. I address this problem to some extent in Simmonds, "The Possibility of Private Law" in John Tasioulas (ed.), *Law, Values and Social Practices* (Aldershot: Dartmouth 1997).

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Dworkin's "Protestantism"

Let us return to the perspective of Hobbes and Grotius. Although there is a real point in thinking of Hobbes as a legal positivist, and Grotius as a natural lawyer, neither writer was concerned with the issue of the "separability of law and morals" that now dominates the debate over positivism. Their theories were not assertions or denials of conceptual connection, but interpretations of the human condition, and of the part played by law in the polity viewed as a response to that condition.

These traditional theories strike me as far closer than are the post-Hartian theories to the problems that lead most people to legal philosophy in the first place. They present the legal order as a solution to a problem of human subjectivity, and enable us to see how law can be conceived in different ways according to our varying conceptions of that problem. Different styles of legal scholarship and of adjudicative reasoning are suddenly revealed as having deep connections with the different ways in which we might think of the modern polity, and of the juridical response to the need for an orderly and peaceful social life. We are thereby enabled to describe the problem of doctrinal scholarship in a simple but enlightening way. Humans have their own projects, and find it hard to agree upon shared standards to govern their conduct. The solution appears to be the establishment of laws that enjoy a degree of determinacy and public ascertainability not exhibited by the standards of morality. This is possible to the extent that law is established by political authority. The doctrinal writer appears to make a considerable contribution to the completeness of the system of norms so established, and to the precision with which areas of entitlement may be defined. Yet how can the doctrinal writer be doing any more than compiling the enactments of authority, given that any propositions that go beyond such compilation appear on the face of things to lack legitimacy? The problem of subjectivity makes law necessary; and doctrinal scholarship appears to extend and perfect the determinacy of law's governance. Yet how can it do this without falling prey to the very subjectivity that gives rise to law's centrality in the first place?

Such a question should have been squarely raised in the debates surrounding Dworkin's theory of law, for Dworkin's theory could be seen as a modern restoration and metamorphosis of the tradition of legal scholarship stemming from Grotius. The question was not raised (or was not adequately addressed) because people were too busy asking whether Dworkin had refuted Hart's thesis that there are no necessary conceptual connections between law and morals. A

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far more important question than that of necessary conceptual connections concerns the viability of Dworkin's account of legal doctrine as a basis for a broader vision of the modern political order. Since Dworkin contemplates a liberal society where people may be expected to hold diverse moral views, we might have expected him to urge the importance of laws that are possessed of a content ascertainable independently of individual moral judgment. This is, however, not so: Dworkin adopts a "Protestant" view of law[52] in which each individual must rely upon his or her own moral judgment in deciding what the law requires. Such judgment is, of course, constrained by the requirements of "fit", but the tightness and reality of that constraint is a matter for much debate. So why will the Dworkinian legal system not spin apart, when located in a community characterised by moral diversity?

Famously, Dworkin claims that there are "right answers" to the great majority of legal cases. This claim, however, must not be confused with the present issue: in a society of moral diversity and cultural pluralism (such as we might expect a liberal society to be) how likely is it that citizens will reach broadly convergent conclusions about what the law requires of them? For if they do not reach such conclusions, the law cannot order their conduct and enable people to form stable mutual expectations; and in the absence of such stable expectations, any theoretical liberties that people possess will be rendered valueless by the uncertainty of the world in which such liberties must be exercised. The existence of "right answers" is irrelevant to this issue, given that such right answers are acknowledged by Dworkin to be inherently contentious; and in the absence of some good reason for expecting convergence, it seems likely that law will collapse into a series of authoritative acts of "interpretation".

At a number of points in *Law's Empire*, Dworkin seems to acknowledge the need for some degree of agreement in a community, if his model of constructive interpretation is to have any application.[53] Thus he tells us that people must share a vocabulary, and must have sufficient similarity of interests and convictions to be capable of making sense of each other's acts and utterances.[54] They must also have "a very great deal of consensus" about what counts as law in the rough "preinterpretive" sense that

[52] Ronald Dworkin, *Law's Empire* (Fontana, London 1986) p. 190.
[53] One could imagine a conservative version of *Law's Empire* that highlighted all the points at which Dworkin acknowledges the need for agreement and convergence, and marginalised the points at which he emphasises Protestant individuality. Such a theory might be considerably more convincing than Dworkin's own version, but its conservativism might superficially seem uncongenial to liberals.
[54] *Law's Empire* pp. 63–64.

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serves to identify the shared object of rival legal interpretations;[55] and they must have shared convictions about how good a "fit" an interpretation must be.[56]

At another point, Dworkin tells us that "Law would founder if the various interpretive theories in play in court and classroom diverged too much in any one generation"; and he points to a number of considerations that help to prevent such divergence from occurring. These considerations include "the general intellectual environment", and "the common language", as well as "the inevitable conservatism of formal legal education, and of the process of selecting lawyers for judicial and administrative office". Finally, an appeal is made to a shared sense of the danger that too great a degree of diversity would indeed lead to disaster.[57]

Such arguments will seem puzzling to anyone who is genuinely troubled by the problem that Dworkin is purporting to address. Take the last point first: that a shared sense of danger might protect us from the centrifugal forces of "protestant" interpretation. Dworkin simply ignores the fact that the situation he is discussing resembles in its structure the classic "tragedy of the commons" beloved of economists and Hobbesian philosophers. Individual agents would have a strong incentive to proffer interpretations of law that favoured their own position and preferences (this is so whether we conceive of these individuals as having egoistic or altruistic preferences). Individual judges would have similar reasons for endorsing some such interpretations. Everyone might be well aware of the dangers inherent in too great a tolerance and endorsement of innovative interpretations, yet they might be powerless to do anything to arrest the slide into a chaos of conflicting interpretations. In each case, endorsement of a new interpretation might yield great gains for some political position (or personal interest) that I hold dear. Meanwhile, the expected cost of such endorsement (in terms of the probability of such endorsements ultimately leading to meltdown) will be diffused across all agents and projects. The divergence between the private costs and benefits of radical interpretation (on the one hand) and the social costs and benefits (on the other) makes a slide into anarchy likely, even in the face of a full appreciation of the danger. Dworkin might say that co-operative strategies could be adopted to prevent this from happening; but (apart from the difficulty of showing that such strategies will be attainable and sustainable) such strategies would almost certainly have to take the form of conventions constraining

[55] *Op. cit.*, p. 66.
[56] *Op. cit.*, p. 67.
[57] *Op. cit.*, pp. 88–89.

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the relevant forms of interpretation and argument. In other words, Dworkin would then be "defending" his theory only by abandoning it.

The other considerations mentioned by Dworkin can be disposed of more easily. Even a shared language is perhaps not something one can take for granted within a state committed to liberal tolerance, still less a shared culture; and there is nothing "inevitable" about the conservatism of formal legal education, as the recent history of some US law schools (particularly those excited by the prospects of interpretative freedom) should have made clear. As for the conservativism of selection for office, might we not expect a community committed to tolerance and diversity to select its officials from as broad a range of cultural and intellectual backgrounds as possible? Would this not be especially important within a legal culture that encouraged constructive interpretation, since that form of interpretation gives such a key role to the interpreter's own moral position?

The feeble nature of Dworkin's response to this key issue is indicative of his focus. While rejecting the flat contrast between analytical and normative jurisprudence, on the ground that it obscures the "interpretive" character of legal theory, Dworkin nevertheless fails to offer the general elucidation of law's role that we might have expected from an "interpretive" theory. His theory takes a narrow focus, setting on one side all questions of law's social context[58] and appearing to assume that the survival of an orderly society is simply a given that can be taken for granted as having no bearing upon his task.[59] To the extent that he abandons the inquiry into necessary conceptual connections between law and morality, it is only to replace that inquiry with a prescriptive theory of adjudication: he does not achieve a genuinely reflective understanding of the modern political community and of law's role within that community.

The core, the penumbra, and the legal treatise

Is there then a genuine problem with the nature of doctrinal writing? Suppose that the activities of the treatise writer were to assume the validity of some Grotian conception of the *suum*, or a Kantian notion of equal freedom, or even a Dworkinian notion of "integrity" and "community". Surely few could then dispute that the activity of doctrinal writing raises problems that merit philosophical debate, and the conclusions to which are not

[58] *Op. cit.*, pp. 11–15.
[59] *Cf.* David Dyzenhaus, *Legality and Legitimacy* (Clarendon Press, Oxford 1997) pp. 16–17.

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foregone. A more relaxed attitude is, however, likely to be adopted by those who think that doctrinal writing can comfortably be fitted to the positivist model. It is therefore worth taking a little time to identify some of the problems that a positivist view of doctrinal writing will have to overcome.

We saw above that the doctrinal scholar possesses no rule-based authority, and yet seems to present, as accurate statements of law, what a positivist should properly regard as proposed resolutions (on the basis of extra-legal considerations) of penumbral issues. Since these proposals cannot be said to enjoy legal status by virtue of rules of adjudication (conferring upon their author the power to authoritatively resolve such matters), they do not seem to enjoy legal status at all.

We might be tempted by the suggestion that the legal scholar simply needs to mark more clearly the transition from stating the existing law (on the one hand) to proposing its amendment or development (on the other). What the legal scholar needs to do is give clear warning when he is about to step beyond the law and into a gap. Having given such indication, he can feel free to offer reasons for resolving the case this way or that.

Should the legal scholar therefore aim at stating the "core of settled meaning" of a rule, before moving on to penumbral issues? It is doubtful if this is a coherent idea, and not simply for such uninteresting reasons as that the transition from core to penumbra can obviously not be marked with precision; any attempted statement of the "core" will unavoidably have its own "penumbra"; and so forth. Rather the point is that nothing serves to identify the core of settled meaning *beyond* the sheer fact of agreement in application. The core of settled meaning can therefore be instantiated, but cannot be articulated otherwise than by instantiation.

Where the doctrinal scholar is dealing with a legal rule that has an authoritative verbal formulation, therefore, an attempt clearly to flag the step from core to penumbra could only take the form of repetition of the authoritative wording, followed by instantiation of core and penumbral instances. In other situations, however, the problem would be considerably more intractable: for the law does not always exist in an authoritative verbal form.

Once we see that the core of settled meaning of a concept is constituted by nothing beyond the fact of agreement in application, we see that such agreement may or may not result from adoption of a shared criterion. In some cases we may agree in our usage of a word across a range of instances because we share criteria for its use; but in other cases we may agree in our usage across a range of

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instances because we hold different criteria that happen to overlap in specific situations. Such criterial divergence would be compatible with agreement on a number of abstract precepts, in addition to agreement upon a range of applications; but, as we shall see in a moment, such abstract precepts would be provisional guides only, taken as settled relative to an envisaged range of applications but tending to fragment in the face of unexpected circumstances.[60]

Consider the following statement from the Preface to *Essays in Jurisprudence and Philosophy*, relating to controversies that arise from "the divergence between partly overlapping concepts reflecting a divergence of basic point of view or values or background theory, or which arise from conflict or incompleteness of legal rules":

> For such cases what is needed is first, the identification of the latent conflicting points of view which led to the choice or formation of divergent concepts, and secondly, reasoned argument directed to establishing the merits of conflicting theories, divergent concepts or rules.[61]

Although clearly having a relevance that goes beyond questions about the penumbral uncertainty of legal rules, these remarks suggest a contrast between the settled usage of the core and the divergence within the penumbra that is the product of an overlap between divergent perspectives or criteria, rather than the product of simple vagueness in a shared criterion.[62] The image we seem to be presented with is one of beams of light cast from different directions upon the flat surface of a floor or wall. The beams produce a bright central patch of overlap, and an area of less bright partial overlap gradually fading into darkness. When penumbral uncertainty manifests this type of criterial overlap, rather than criterial vagueness, any reduction in the area of penumbral uncertainty will require a choice between different perspectives. The significance of this point becomes a great deal clearer when we turn to Hart's discussion of case law, for his remarks on case law tend to suggest that the model of overlap might be the best way of explaining penumbral uncertainty in such contexts.

Hart's discussion of case law begins by acknowledging that there is no authoritative verbal formulation of the rules of case law. He then goes on, notoriously, to observe that "The head-note is usually correct enough."[63] This has led many readers to conclude that he has a rather simple, if not simplistic, view of case law, whereby a general

[60] *Cf.* Matthew Kramer, *In Defense of Legal Positivism* (Oxford 1999) pp. 142–143.
[61] H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press Oxford 1983) p. 6.
[62] I drew attention to this point in my essay "Bringing the Outside In" (1993) 13 Oxford Journal of Legal Studies 147 at p. 156.
[63] H.L.A. Hart, *The Concept of Law*, 2nd edition (Clarendon Press, Oxford 1994) p. 134.

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and a-contextual rule may be extracted from each case. When we read on, however, we come to a passage that clearly indicates how Hart's understanding of the settled content of a rule of case law is a very context-dependent notion. For he tells us that "there is often very general agreement, *when the bearing of a precedent on a later case is in issue*, that a given formulation is adequate."[64]

It would be both easy and tempting to equate this statement with Hart's observation that a rule is still a rule even if it ends in the word "unless ..." and is subject to unspecified future exceptions.[65] Raz has offered an account of precedent that seems to build upon such an interpretation of Hart, by arguing that the power of courts to "distinguish" earlier cases can be understood as a power to modify the rulings in those cases by the addition of an exception: the constraint upon this power is the requirement that the "rule-plus-exception" must justify the earlier decisions to the same extent as the "rule-minus-the-exception" did. The Razian analysis therefore appears to adopt, as the basis for an analysis of case law, Hart's remark about "unless". That remark, however, occurs in the specific context of pointing out that debate concerning the binding force of rules has been structured by the false assumption that rules must bind "as fetters bind" if they are binding at all. It is to resist this idea that Hart observes that rules may bind even though they end in the word "unless"; for that specific purpose, the remark is an effective one. By contrast, the formulation from page 134 (quoted above) occurs in the context of attempting to describe certain well-established features of case law, and it is considerably more subtle.

As I have pointed out elsewhere, Raz's analysis fails to accommodate the fact that the development of case law not untypically involves a re-casting of rules that cannot be treated as the addition of an exception to an otherwise unaltered rule.[66] Hart's formulation on page 134 of *The Concept of Law* allows for this point, while the crude analysis offered by Raz obliterates the subtlety of that formulation.

It seems to follow from Hart's analysis that it may frequently be impossible to formulate a statement of case law that is both uncontentious and a-contextual: statements are only uncontentious so far as a particular context of application extends. The doctrinal writer, however, needs to give statements of general principles, not judgments about particular applications. On the Hobbesian

[64] *Op. cit.*, p. 134, my italics.
[65] Hart, *op. cit.*, p. 139.
[66] Simmonds, "Bluntness and Bricolage" in Hyman Gross and Ross Harrison (eds.) *Jurisprudence: Cambridge Essays* (Clarendon Press, Oxford 1992) pp. 8–11.

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assumption that law is a product of authority, then, how is the doctrinal scholar to proceed?

We might note parenthetically that it is precisely this tension between the contextual dependence of any uncontentious statement of case law, and the a-contextual propositions of the legal treatise, that leads experienced lawyers to regard such scholarly propositions as general guides only: potentially misleading when read without an awareness of their capacity to metamorphose when put into action.[67] The juridical understanding of the traditional common law judge resembles moral understanding: it is informed by tradition and experience, but is not such that it is fully articulable (or even fully possessed) prior to its application in an individual case.[68] The treatise seeks to reflect upon the judge's experience, and to construct principles that will serve as ordering categories and provisional guides. If viewed as a simple rule-book, the treatise can only mislead. Ideally, the legal scholar is guided by the same moral understanding as the wise judge, and his elucidation of what has been done raises the level of reflective awareness exhibited by that understanding. Philosophical perspectives that obscure the nature of reflective understanding are therefore poorly placed to explain the nature of doctrinal scholarship.

Rather than proposing that the legal scientist should clearly mark the step from core to penumbra, Kelsen proposes a different way of overcoming the problem. His suggestion is that, when acting as a legal scientist, one should not offer favoured interpretations of legal rules, but should simply set forth every possible interpretation of the rule.[69] It is doubtful if this is a coherent suggestion. The meaning of any human utterance is in part a function of formal semantic rules, and in part a function of contextual assumptions and understandings. Formal semantic rules rarely if ever constrain the possible meanings so narrowly that it would be possible to give an exhaustive account of them.[70] One must also remember that legal scholars seek to reconcile and systematise rules. If each rule is to give rise to a large plurality of different possible interpretations, all of which must be given equal weight by the scholar, the

[67] Consider, for example, the following observation from one of the most perceptive of common lawyers: "I have an uncomfortable theory that once any body of law can be written out in a textbook, it is incapable of true response": S.F.C. Milsom, *Studies in the History of the Common Law* (Hambledon Press, London 1985) p. 212.

[68] Hans-Georg Gadamer, *Truth and Method*, 2nd English edition, (London 1979). *Cf.* Lon Fuller's observation that "The scope of the precedent is determined not only in the light of the end-in-view pursued by the court that decided it, but in the light of ends then out of view because not stirred into active consciousness by the facts of the case being decided": Lon Fuller, "Human Purpose and Natural Law" [1958] Natural Law Forum 68 at p. 74.

[69] Hans Kelsen, *The Pure Theory of Law*, translated by Max Knight, (University of California 1967) p. 355.

[70] See Simmonds, "Between Positivism and Idealism" [1991] Cambridge Law Journal 308.

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combinatorial possibilities for systematisation will rapidly exceed the capacity of even very powerful computers.

The Grotian tradition provided the historical basis for modern doctrinal scholarship, but was to founder upon the emptiness of some of its central concepts. The tradition of legal positivism, by contrast, began in a posture of hostility towards all forms of legal commentary, but found its mantle assumed by scholars who claimed to report and systematise without going beyond the authoritative enactment. It seems, however, that Hobbes may have been more perceptive than some of his heirs. For the doctrinal writer's task is not a redundant one of repetition and compilation; yet the scholar possesses no authority that would ground pronouncements going beyond the content of the established law, and no obvious way of marking the step from law to non-authoritative opinion.

Conclusion

The shift away from Aristotelian jurisprudence had a number of consequences. It gave rise to a vision of political order spawning two contrasting traditions of juridical thought (exemplified by Grotius and Hobbes) that continue to exert their influence. By erasing the idea that all understanding of human action and institutions must draw upon the evaluative understandings of practical wisdom, it enforced upon us an exhaustive division between the neutral cognition of social facts and the evaluation or prescription of action. This rendered problematic the nature of the doctrinal scholar's exposition of the law, for the doctrinal scholar appears upon the face of things to render the law intelligible by relating its content to comprehensible values. Finally it generated a split between prescriptive and analytical jurisprudence that obscured important issues and sent generations of legal theorists on a largely time-wasting errand.

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